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No. 98-956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. CANNON &
WILLIAM L. BLAGG,

Petitioners,

v.

LAWRENCE G. WILLIAMS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND THE FEDERAL BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND THE FEDERAL BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITION

The National Association of Assistant United States Attorneys ("NAAUSA") and the Federal Bar Association ("FBA"), *amici curiae*, respectfully submit this joint Brief in support of Petitioners Charles J. Cannon's and William L. Blagg's Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.[1]

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[1] Pursuant to Rule 37.6, no part of this brief was authored by counsel for the petitioners, and all monetary contributions for the preparation and submission of this brief have or will come from *amici* except to the extent that counsels' services have been provided *pro bono publico*.

Pursuant to Rule 37.2(a), all parties to this action have given their written consent to the filing of this brief. Copies of the consents have been filed simultaneously herewith.

INTERESTS OF AMICI CURIAE

NAAUSA is a non-profit corporation organized under the laws of the District of Columbia, with its principal place of business in Alexandria, Virginia. A professional, non-governmental association, NAAUSA's primary objective is the promotion and protection of the career and professional interests of Assistant United States Attorneys. NAAUSA serves as a resource for policy makers in the executive and legislative branches and helps educate them with regard to issues that concern NAAUSA's members. Currently, NAAUSA has over 1,000 members with representatives in every United States Attorney's office.

The FBA is a nationwide organization with approximately 15,000 attorney members. The majority of association members have at some time in their professional careers served in the public sector. Approximately 2,800 members are presently government attorneys, and the remainder are in private practice or other pursuits. The association's members share a common interest in federal practice.

Both NAAUSA and FBA have strong interests in the resolution of the issue of whether attorneys may appeal published decisions determining that counsel has committed serious professional misconduct. As Judge Lynch (joined by Chief Judge Torruella and Judge Lipez) noted in her dissent from the vote against rehearing *en banc*, "[b]eing branded unethical or incompetent by a federal judge can essentially destroy a lawyer's career." App. 36a. Yet if the original majority decision is upheld, a "lawyer attempting to pursue a client's interests zealously may, if faced with an arbitrary judge

or a judge who has an erroneous view of the facts, end up with a blot on his or her record that will never be erased – unless an appeal is possible to correct the problem." App. 36a-37a.

Similarly, FBA and NAAUSA are concerned that decisions like those of the courts below may exert an inappropriate chilling effect on zealous advocacy. The right of appeal is crucial to establishing, through court review, the proper line between zealous advocacy and sanctionable conduct.

NAAUSA and FBA believe they are in a special position to aid this Court in understanding and appreciating the importance to, among others, government and public service litigators of a right to appeal judicial findings of serious professional misconduct, where no monetary penalty has been imposed (or where, as here, the monetary sanction was subsequently removed for judicial error). As explained in the argument below, *amici* believe that, ironically, judges may be more reluctant to impose monetary sanctions on government and public interest attorneys because of the courts' recognition that those attorneys are, relatively speaking, lower-paid, salaried employees. At the same time, judges may be more prone sharply to chastise government attorneys as a surrogate for reining in real or perceived executive branch misconduct. The result may be that government and public interest attorneys receive more stinging *verbal* opprobrium from the courts – unappealable, according to the First Circuit's majority opinion – while private practitioners who receive modest, but less professionally damaging, monetary sanctions can automatically seek review.

REASONS FOR GRANTING THE PETITION

FBA and NAAUSA agree with the petitioners that the issue before this Court is of fundamental importance to every attorney appearing in federal court. As associations

representing thousands of such attorneys – including those who practice in the First and Seventh Circuits, where appellate jurisdiction for non-monetary sanctions, as a practical matter, now does not exist – *amici* believe it is essential for there to be meaningful appellate review of public, judicial condemnations of lawyers' conduct. Especially in the case of government and public interest lawyers – who often must assert controversial positions or represent unpopular parties, and who may be *less* likely to receive monetary punishments – judicial review is the *only* means by which a potentially career-limiting condemnation may be rectified.

Faced with this issue, three other circuits, as well as four of the eight circuit judges who considered this matter in the proceedings below, have agreed that appellate jurisdiction was appropriate in circumstances such as these. Moreover, even within the First and Seventh Circuits -- the two circuits that have denied appellate jurisdiction -- the courts have failed to agree on a single standard of appealability. *Compare* App. 13a ("[w]ords alone may suffice if they are expressly identified as a reprimand") *with Clark Equipment Co. v. Lift Parts Mg. Co.*, 972 F.2d 817, 820 (7th Cir. 1992) (absence of monetary sanction precludes any appeal). Thus, for NAAUSA's and FBA's members, whether a published finding of misconduct will remain forever unreviewable depends almost exclusively on geography.

In addition, the jurisdictional issue is of exceptional importance because it affects the reputation and public perception of the judiciary for fairness. In *amici's* view, the lower courts were insufficiently sensitive to, in the words of one United States District Judge, the magnitude of "the sting of public criticism delivered from the bench." William W. Schwarzer, *Sanctions Under the New Rule 11 -- A Closer*

Look, 104 F.R.D. 181, 201 (1985), quoted in *Thomas v. Capital Security Services*, 836 F.2d at 878.

A finding of intentional misconduct on the part of an attorney is serious business. As the Ninth Circuit has recognized, "published opinions chastising [counsel] by name" constitute "serious sanction." *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992). Indeed, "one's professional reputation is a lawyer's most important and valuable asset." *Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997). Because "[a] lawyer's reputation for integrity, thoroughness, and competence is his or her bread and butter," *FDIC v. Tekfen Construction & Installation Co.*, 847 F.2d 440, 444 (7th Cir. 1988), "criticism delivered from the bench . . . can . . . damage a lawyer's reputation and career." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 878 (5th Cir. 1988). Sanctions "act as a symbolic statement about the quality and integrity of an attorney's work -- a statement which may have tangible effect upon the attorney's career." *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994). *See generally*, Andrew L. Kaufman, *Judicial Ethics: The Less Often Asked Questions*, 64 Wash. L. Rev. 851, 864 (1989) ("[p]ublic criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation").

The seriousness of judicial declarations of attorney misconduct is amplified in modern times by the emergence of computer-assisted legal research databases. For example, the decisions of the bankruptcy and district courts here will forever be responsive to a Westlaw or Lexis search for the name of either Cannon or Blagg. Whether such a search is undertaken by a prospective employer, an opposing counsel,

or a trial judge, these opinions will remain readily accessible stains on the careers of these attorneys. Appellate review may not always provide a complete remedy, but an opinion of a higher court will presumably be similarly responsive to a search for the attorney's name, and may thus serve to ameliorate the damage.

The court of appeals held that there could be no sure remedy for the damage visited upon Cannon and Blagg, no matter that the determinations of misconduct were incorrect, and no matter how procedurally defective the methods by which they were reached. That ruling will be viewed, at least by the many lawyers made familiar with this case (through, among other things, FBA's and NAAUSA's involvement in it), as a failure of justice. The panel majority's approach therefore ill serves the interest of the judiciary in maintaining the public reputation of fairness in judicial proceedings. *E.g.*, *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 318 (1929); *United States v. Atkinson*, 297 U.S. 157, 169 (1936); *United States v. Olano*, 507 U.S. 725 (1993).

If the First Circuit's majority decision is allowed to stand, FBA and NAAUSA are concerned that, as Judge Rosenn pointed out in his panel dissent, judges within that Circuit (as well as those in the Seventh Circuit) could "escape appellate review of an unfounded or intemperate censure merely by refraining from labeling the public reprimand as an order or decree." App. 29a. Regardless of a judge's actual intent, confidence in the judiciary may be eroded if attorneys are given reason to suspect that a judge has evaded appellate review by condemning an attorney in a published opinion but avoiding the formal label "reprimand."

Equally important, a published decision condemning an attorney by name for serious professional misconduct is no less a sanction than one that adds the formalistic label:

"reprimand." As the Fifth Circuit indicated in *Walker v. City of Mesquite*, 129 F.3d at 832, a "declaration by a court that counsel is an unprofessional lawyer" is indeed a more serious sanction than a small monetary fine. *See also Martin v. Brown*, 63 F.3d 1252, 1260 (3d Cir. 1995) (observing, as part of a ruling allowing an interlocutory appeal from monetary sanctions not yet fixed as to amount, that "[i]n the overall context of this case, the dollar amounts of the sanctions imposed and the potential liability for the unquantified sanction are insignificant in comparison to their stigmatic effect").

NAAUSA and FBA are particularly concerned that the consequences of a rule precluding appeals from findings of attorney misconduct may fall disproportionately on government and public interest attorneys. First, it appears that allegations of attorney misconduct, particularly against the government, have become a routine litigating tactic in the past few years, directed not at exacting reimbursement for expenses out of the pockets of government attorneys but rather at procuring default judgments (as sought in the instant case), preclusion, or other strategic advantages. *Cf. Starcher v. Correctional Medical Systems, Inc.*, 144 F.3d 418, 425 (6th Cir. 1998) (*cert. pending*) ("requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses"). Second, courts seem to believe that they have a special obligation to police government misconduct (and perhaps they do). Accordingly, as the number of allegations increases (which may not be at all reflective of an increase in instances of actual misconduct), judges are more frequently drawn into disputes in which occasional judicial error is inevitable. At the same time, many judges realize that government attorneys are salaried workers whose advocacy and heavy caseloads are not driven by pecuniary interests. For these reasons, many judges may

be more reluctant to impose monetary sanctions on government attorneys and, for reciprocal reasons, they may be more likely to resort to public criticism. Yet they may not even think to label their reprimands as such. Ironically, then, it may be that the government attorney who is sharply punished by a verbal reprimand may never be permitted an appeal, whereas the private practitioner – who is, perhaps, merely fined a small amount – may pursue his case up the line. Many of these same factors apply to public interest lawyers as well.

Finally, there is always a tension or conflict between the threat of sanctions and zealous advocacy. The availability of appellate review is a critical component in maintaining the proper balance. That balance is badly skewed if lawyers' professional reputations can be destroyed summarily by errant trial judges with no recourse to appellate review, no matter how unsubstantiated are the charges and how defective are the procedures by which the judge arrives at the findings underpinning the determination of misconduct.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the National Association of Assistant United States Attorneys and the Federal Bar Association, *amici curiae*, respectfully submit that the petition should be granted.

Respectfully submitted,

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